

Wisconsin's Green Fire: Voices for Conservation

Analysis of Assembly Bill 547 / Senate Bill 600 amendments to provide exemptions from state permitting for certain non-federal wetlands.

Summary of alternatives identified by Wisconsin's Green Fire for flexibility in regulation of non-federal wetlands.

February 11, 2018

Legislation Description: AB547 and SB600 relate to permitting and mitigation requirements for nonfederal and artificial wetlands. Substitute Amendment 1 to SB600 and the Legislative Reference Bureau description are available at

http://docs.legis.wisconsin.gov/2017/related/amendments/sb600/ssa1_sb600.

Introduction: This paper updates Wisconsin's Green Fire's (WGF) December 18, 2017 issue paper and testimony submitted at the joint Senate/Assembly hearing on December 21, 2017. It addresses the Senate's Substitute Amendment 1 passed out of the Senate Committee on Natural Resources and Energy on February 8, 2018. Assembly Substitute amendment 3, which mirrors Senate Substitute Amendment 1, was offered on February 9, 2018.

Summary of Wisconsin's Green Fire Analysis: Wisconsin's Green Fire understands the intention of Amendment 1 was to address the concerns expressed at the hearing on December 21, 2017. However, if enacted into law, AB547 / SB600 as proposed with Amendment 1, would still have significant adverse impacts to wetlands and the ecosystem services they provide, primarily flood control, water quality, and wildlife habitat in urban areas. This does not serve the public interest. WGF also recognizes there are legitimate concerns regarding the regulation of created, artificial, and farmed wetlands, that are covered only by state wetland laws. We are willing to lend our expertise to help craft approaches to address these specific concerns. Alternatives identified by WGF are presented in this paper. In brief, we recommend

- Maintain state wetland permitting for non-federal wetlands in urban and agricultural areas, but task the Wetlands Study Council or the Department of Natural Resources (DNR) with exploring expanded General Permits for state regulated wetlands that provide limited functional values.
- Examine regulatory streamlining for certain small historically farmed wetlands within farm fields.
- Maintain professional standards of Wisconsin's assured wetland delineator program, but expand training and certification opportunities.
- Provide for on-site reviews of wetland delineations by the DNR or an assured delineator.
- If urban and agricultural exemptions in Amendment 1 move forward, require applications to include wetland boundaries, size, type and functional values to determine mitigation needs and hydrological evaluations of flooding risk.
- Allow a reasonable time period for DNR review such as 30 days.
- Make the Wisconsin Wetland Conservation Trust (in lieu fee) mitigation program more workable for parties who want to restore wetlands on private and public lands.

Wisconsin's Green Fire: Voices for Conservation

Background: The federal Clean Water Act applies to wetlands adjacent to a navigable water body. Current Wisconsin law applies to *all* wetlands, regardless of their location on the landscape. Under both federal and state laws, before a wetland can be destroyed or filled, developers must first go through a permitting process that includes evaluations of alternatives and ways to minimize impacts. The amendment to the proposed legislation would provide an exemption from permitting for non-federal wetlands located in urban areas, within one half mile of the urban boundary, or for agricultural structures and roads. The legislation defines urban areas as incorporated areas and areas served by sewers. It also disqualifies certain “high-quality” wetlands from the exemption. The legislation also provides an exemption for artificial wetlands. Other provisions of the legislation include changes to a state wetland mitigation program, changes to DNR review procedures for wetlands, authorization for the state to assume the federal wetland regulatory program, and a prohibition on local ordinances more stringent than state wetland regulations.

A. Impacts based on science and implementation of the state regulatory program

WGF has four main concerns with the amendment as follows:

A1. Flood Risk

If passed, this bill would increase the risk of flooding in urban areas by allowing the filling of non-federal wetlands that currently serve to slow and absorb waters from rain events.

Wetlands in urban areas provide vital flood control services during major rain fall events. A one-acre wetland (maximum allowed by the urban exemption) can typically store about three-acre feet of water, or one million gallons. Three acre-feet is one acre of land, about three-quarters the size of a football field, covered three feet deep in water. Trees and other wetland vegetation help slow the speed of flood waters. This action, combined with water storage, can actually lower flood heights and reduce the water’s destructive potential¹. Cumulative impacts from multiple wetland filling projects could have a substantial impact on a community’s resilience to withstand floods thus resulting in substantial property damage and endangering public safety. Under the amended bill, the DNR must presume an exemption request is eligible, unless within 15 days, it determines the eligibility requirements are not met (see “Implementation”). Contribution to flood risk by filling the wetland is not evaluated. Furthermore, local communities that wish to maintain non-federal wetlands to lower the risk of flooding would be prohibited from enacting ordinances that are more stringent than state law.

A2. Storm water

This bill wrongly assumes that storm water regulations, on their own, will protect communities from damages caused by flooding.

Wisconsin's Green Fire: Voices for Conservation

The urban exemption requires that the area be subject to storm water permitting and zoning standards. The storm water regulations require post construction treatment of storm water, commonly achieved through the use of detention ponds. The purpose of these ponds is primarily to treat runoff before release to surface water or groundwater. In some cases these ponds can contribute to flood control, however, they are not designed to address major flood events. For example the typical wet detention basin is designed to only retain a two year 24 hour rainfall event, which is adequate for storm water treatment but does not equal the capacity of natural wetlands. Each specific storm water treatment device has its own design criteria². Likewise, each natural wetland has its unique features that impact flooding. A practical alternatives analysis currently required in the wetland permitting process evaluates these characteristics for any given proposal.

A3. Protect wildlife and other wetland values

This bill does not fully address the importance of non-federal wetlands to wildlife. It also supports the misconception that wetland mitigation truly replaces the natural wetlands lost.

Urban and agricultural wetlands can be very productive from a wildlife standpoint. Substitute Amendment 1 to SB600 adds mitigation requirements for the urban exemption, which is an improvement over past versions of the bill. While mitigation helps to off-set impacts from filling, according to the Wisconsin DNR's evaluation, mitigation projects in many cases fail to achieve the same ecological productivity and complexity as natural wetlands³. Sometimes it is necessary to fill or destroy wetlands. In those cases wetland mitigation is one method to restore wetlands although in most cases the restored wetlands fail to achieve the same quality. The state and federal permit system helps to identify and evaluate alternatives to filling wetlands before eliminating a natural functioning wetland community. Additional flexibility could be interjected into this system without eliminating the evaluation of alternatives to permanently destroying natural functioning wetlands.

A4. Implementation

The implementation requirements in this bill set up a program that is unlikely to succeed, by weakening the standards for professional wetland delineators, eliminating DNR site visits to ground truth delineations, not requiring sufficient information for exemption applications, and setting a review timeline that is too short for adequate review given DNR staffing and funding.

Wisconsin's Green Fire is very concerned about the impact this amended bill, if enacted into law, would have on program implementation. The amendment would not give DNR the ability to provide meaningful oversight over wetland boundaries, legal eligibility for the exemptions, or flooding risks to neighboring properties and municipalities. The review must be completed in 15 days and DNR must approve wetland boundaries without going on-site. The bill weakens the professional standards for wetland delineations. The DNR already operates a successful professional wetland delineator certification program. This amendment delegates authority to

Wisconsin's Green Fire: Voices for Conservation

delineators with minimal training and experience, increasing the possibility of errors and unintentional violations of the newly created standards. Furthermore, under the amended bill, an exemption request could include a professional's statement that a project is eligible for the exemption without a formal delineation process to determine the boundaries, size, and type of the wetland. Finally, the amendment places strict timelines and requirements on the wetland mitigation program. Green Fire understands the frustration over lack of progress in the wetland mitigation and banking program. There are many reasons for delays including complex federal regulations, the importance of good planning for a successful project, and finally a lack of DNR staffing. Another impediment is the requirement that mitigation sites under the "in lieu fee" subprogram be open to public access. Proscriptive timelines and focusing mitigation sites on state properties creates more roadblocks and impediments instead of reducing the overall regulatory processes.

B. Alternatives:

Wisconsin's Green Fire (WGF) recognizes legitimate concerns about the application of Wisconsin's wetland regulations on certain topics. WGF remains committed to providing information for workable regulatory reform that protects the values wetlands provide to Wisconsin. The Wetlands Study Council proposed in the amended bill could be a venue to formulate workable approaches, if membership provided balance in outlooks and experience. Summaries of the issue and alternative approaches identified by WGF are provided as follows:

B1. Exemptions:

Issue: The amended bill would allow filling of exempt wetlands without consideration of options to avoid or minimize impacts through permitting. The exemption would apply to "urban" areas, defined broadly as within one half mile of incorporated areas and areas served by sewers. This definition covers a large area of the state, and would include urban, suburban, small towns, and some rural areas. Wetlands in these areas provide important wildlife habitat and flood mitigation. Exemptions would also be available for relatively large wetland fills for agricultural roads, driveways, and buildings. Although the provision for mitigation for the urban and agricultural exemptions in the amendment offer an improvement over previous versions, the values provided by wetlands in those locations would be lost. The bill also provides an exemption for artificial wetlands for which there is no definitive wetland history before 1991.

Alternatives: The exemption for artificial wetlands is a reasonable step to streamline wetland regulations. WGF recommends maintaining state wetland permitting for non-federal wetlands in urban and agricultural areas, but tasking the Wetlands Study Council or the DNR with exploring expanded General Permits for state regulated wetlands that provide limited functional values. Currently wetland General Permits with streamlined review and no mitigation requirement are available for wetland fills up to 10,000 square feet. WGF also recommends an examination of regulatory streamlining for small historically farmed wetlands within farm fields if functional values are low, such as areas with only hydric soil wetland characteristics remaining. These features are sometimes referred to as "pocket wetlands."

Wisconsin's Green Fire: Voices for Conservation

B2. Process to Implement Exemptions:

Issue: The process established in the amended bill would be difficult to implement leading to reduced oversight by DNR and increased violations, including inadvertent violations. The amended bill would reduce professional standards for private delineators who are not required to have on-site review by DNR. Wetland delineations by these private delineators in non-federal wetlands must be presumed accurate by DNR without on-site verification and within 15 days. Exemption requests would not necessarily require a delineation to determine wetland size and type. Exemption requests must be presumed eligible and must be granted by DNR within 15 days unless more information is needed to determine eligibility. Flooding risks to other properties and municipalities would not be evaluated for urban or agricultural exemptions. Although the amended bill would require compliance with storm water permitting for the urban exemption, storm water requirements are not designed to reduced flood risk so much as they are designed to maintain water quality in runoff. The fiscal impact of the bill would contribute to the continuing reduction in DNR staffing levels which adds to regulatory delays and frustration of developers.

Alternatives: WGF's assessment does not find that the urban and agricultural exemptions in the amended bill serve the public's interest. However, WGF provides the following comments on implementation if the exemption process were to move forward. To provide effective oversight, the process should allow a reasonable time period for review such as the 30 days allowed for General Permits. The process should maintain professional standards of Wisconsin's assured wetland delineator program, but expand training and certification opportunities. The process should provide for on-site reviews of wetland delineations by DNR unless performed by an assured delineator. The process should require exemption applicants to substantiate their application with a delineation that specifies wetland boundaries, size, type and functional values, which would also be needed to determine mitigation needs. The process should require urban and agricultural exemption applicants to provide hydrological or engineering evaluations of flooding risks to downstream properties and municipalities and adjust eligibility to minimize impacts.

B3. Mitigation under the Wisconsin Wetland Conservation Trust (in lieu fee) sub-program:

Issue: This new program has experienced a slow start for many reasons. Directing the DNR to identify 25% of DNR lands for wetland restoration in six months would be a major staff investment taking away from other priorities and may result in sites that are not suitable for successful projects.

Alternatives: Make the program more workable for all who wish to restore wetlands. Evaluate reimbursement procedures, approval processes, and public access requirements for private lands. Offer the opportunity for wetland restoration on DNR land without the difficult deadlines and required amount of public land for this purpose in the amended bill.

Wisconsin's Green Fire: Voices for Conservation

About Wisconsin's Green Fire

This analysis was prepared by members of Wisconsin's Green Fire Public Trust and Wetlands Workgroup. Members include retired staff from regulatory programs in the Wisconsin Department of Natural Resources and wetland scientists. Wisconsin's Green Fire: Voices for Conservation (WGF) is a newly formed independent nonpartisan organization. WGF supports the conservation legacy of Wisconsin by promoting science-based management of its natural resources. Members represent extensive experience in natural resource management, environmental law and policy, scientific research, and education. Members have backgrounds in government, non-governmental organizations, universities and colleges and the private sector. More information about WGF can be found at www.wigreenfire.org.

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